U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

SUBURBAN AIR FREIGHT, INC.,
GEOFFREY GALLUP,
MARK P. MEYER, and
JAMES V. ARMSTRONG,

RESPONDENTS.

ARB CASE NO. 98-160

ALJ CASE NO. 97-SCA-4

DATE: August 17, 2000
REISSUED: August 21, 2000[1/]

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[2/]

Appearances:
For the Department of Labor:
Leif G. Jorgenson, Esq.; Paul L. Frieden, Esq.; Steven J. Mandel, Esq.,
U.S. Department of Labor, Washington, D.C.

For the Respondents:
Jerry L. Pigsley, Esq., *Harding, Shultz & Downs, Lincoln, Nebraska*

For Amicus Curiae Emery Worldwide Airlines, Inc.:
Hopewell H. Darnielle III, Esq.; Brett E. Bacon, Esq., *Verner, Liipfert, Bernhard, McPherson and Hand, Washington, D.C.*

DECISION AND ORDER OF REMAND

Beginning in 1990, Suburban Air Freight, Inc., entered into a series of contracts with the U.S. Postal Service to transport mail by providing air cargo services. The Postal Service contracts were subject to the Service Contract Act, as amended, 42 U.S.C.A. §351 *et seq.* (West 1994)(SCA or Act), and each included a wage determination issued by the Wage and Hour Division, U.S. Department of Labor, establishing minimum wage rates to be paid to service employees working on the contracts, including airline pilots.

[1/] This decision was reissued to correct typographical errors.

[2/] This appeal has been assigned to a panel of two Board members, as authorized by Secretary's Order 2-96. 61 Fed. Reg. 19,978 §5 (May 3, 1996).

In November 1996, the Department of Labor filed an enforcement action against Suburban Air Freight and its Secretary-Treasurer, Geoffrey Gallup, pursuant to 29 C.F.R. §6.15 (1999). The Department alleged that Suburban Air Freight and Gallup failed to pay SCA-required prevailing wages to several pilots who worked on the Postal Service contracts, and also violated the Act in several other respects. The Department's complaint was amended in March 1997 to name two additional corporate officers as respondents, Mark P. Meyer and James V. Armstrong.[3/]

As part of its defense, Suburban argued that its airline pilots were "learned professionals" within the regulatory standards found at 29 C.F.R. Part 541 (1999), and therefore were not "service employees" as defined under the Service Contract Act at 41 U.S.C.A. §357(b). Following discovery, both the Department and Suburban filed motions for summary decision on this "professional exemption" issue. The Administrative Law Judge (ALJ) granted Suburban's motion for summary decision and dismissed the complaint, believing that the "learned professional" status of airline pilots was controlled in significant part by the decision of the U.S. Court of Appeals for the Fifth Circuit in *Paul v. Petroleum Equipment Tools Co.*, 708 F.2d 168, *reh'g den'd*, 714 F.2d 137 (1983). [ALJ] Decision and Order Granting Respondent's Motion for Summary Decision and Dismissing Complaint, ALJ Case No. 97-SCA-4 (July 23, 1998) (ALJ D&O), slip op. at 9-10. This appeal followed.

We have jurisdiction pursuant to 29 C.F.R. §8.1(b)(3) (2000).

STANDARD OF REVIEW

A grant of summary judgment is reviewed *de novo*, that is, our review is governed by the same standard used by the trial court. *Administrator v. Native Technologies, Inc.*, ARB Case No. 98-034, ALJ Case No. 96-LCA-2 (May 28, 1999), slip op. at 5-6, citing *Han v. Mobil Oil Corporation*, 73 F.3d 872, 874-875 (9th Cir. 1995). Viewing the evidence in the light most favorable to the non-moving party, we must determine whether there are any genuine issues of material fact and whether the lower court correctly applied the relevant law. *Id.*, citing *Mongeluzo v. Baxter Travenol Long Term Disability Benefit Plan*, 46 F.3d 938, 942 (9th Cir. 1995).

DISCUSSION

The question whether airline pilots qualify as "learned professionals" under the Part 541 regulations (and therefore are exempt from SCA coverage) was addressed in detail in our recent decision in *U.S. Postal Service ANET and WNET Contracts*, ARB Case No. 98-131 (Aug. 4, 2000).

[3/] In this Decision, we refer to respondents Suburban Air Freight, Inc., Gallup, Meyer and Armstrong collectively as "Suburban."

As we noted in that decision, an employer claiming that a worker is exempt as a "learned professional" must prove that the worker meets three specific requirements under the Part 541 "short test":

1. The employee's primary duty consists of "[w]ork requiring knowledge of an advance[d] type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes[.]" 29 C.F.R. §§541.3(a)(1), 541.3(e); *and*

2. The employee's "work requires the consistent exercise of discretion and judgment in its performance[.]" §541.3(b) and (e); *and*

3. The "employee . . . is compensated on a salary or fee basis at a rate of not less than $250 per week . . . exclusive of board, lodging or other facilities[.]" §541.3(e).

Postal Service at 10. In order to meet the first of these tests (knowledge of an advanced type in a field of science or learning), we noted that the Part 541 regulations provide the following standards:

- "Knowledge of an advanced type in a field of science or learning" (29 C.F.R. §541.3(a)(1)) means that the profession is learned through a "prolonged course of specialized intellectual instruction," rather than a general academic education or an apprenticeship. 29 C.F.R. §541.301(a), (d).

- Generally, "advanced knowledge" means knowledge that cannot be obtained at the high school level. 29 C.F.R. §541.301(b).

- Entry into the profession typically requires an advanced academic degree as "a standard (if not universal) prerequisite," such as the fields of law, medicine, nursing, accounting, actuarial computation, engineering, architecture, teaching, and various types of physical, chemical and biological sciences (including pharmacy and registered or certified medical technologists). Although in some instances the professional training may consist of concentrated study lasting fewer than four years (*e.g.*, registered nurses who have been examined by state licensure boards), the examples of "learned professions" cited by the Secretary almost universally are entered following four years or more of higher education, with significant specialization. 29 C.F.R. §541.301(e)(1).

Postal Service at 14.

We found that "while pilots are highly skilled, the training required to become a pilot simply doesn't meet the 'knowledge of an advanced type in a field of science or learning' standard for being a 'learned profession[,]'" observing that none of the many parties participating in the *Postal Service* case disputed "the general proposition that most pilots do not enter the occupation through formal academic training." *Id.* at 17, 19.

Finally, with regard to the Fifth Circuit's decision in *Paul* – a key consideration in the ALJ's decision in this case – we noted our respectful disagreement with the court's analytical approach to the professional exemption claim. *Id.* at 19-22.

Because the record in *Postal Service* could not support a claim that airline pilots customarily enter their profession through a prolonged course of formal academic training, we concluded that the occupation did not qualify as a "learned profession" under the Part 541 regulations. Nothing in the record in the instant matter persuades us to the contrary; thus, we similarly find in this case, as a matter of law, that airline pilots are not members of a "learned profession."[4/]

It is apparent that the ALJ below harbored similar doubts, noting in his Decision that "[a]though pilots are highly skilled individuals, I question whether any pilot can be considered in a 'learned' profession within the meaning of the Act and the regulations. However, I am bound by the decision in *Paul*." ALJ D&O at 9 n.5. We do not share the ALJ's assumption that *Paul* controls the outcome of this case. *See generally* Samuel Estreicher & Richard L. Revesz, Nonacquiescence by Federal Administrative Agencies, 98 Yale L.J. 679 (1989), cited in 1 Kenneth Culp Davis & Richard J. Pierce, Jr., Administrative Law Treatise §2.9 (3d Ed. 1994).

Based on the record before us, and for the reasons outlined above and in the *Postal Service* case, we find that airline pilots are not "learned professionals" under the Part 541 regulations because the occupation does not meet the "knowledge of an advanced type in a field of science and learning" requirement.

Because we find that Suburban's airline pilots do not meet the "knowledge" test for exemption as learned professionals, it is unnecessary to consider whether they meet the "salary basis" test.

[4/] Of course, the question of professional status inevitably is tied to the evidence presented to a tribunal, and we cannot rule out the possibility that in some future case an employer may marshall facts sufficient to demonstrate that the airline pilot occupation meets the standards of the Part 541 regulations. However, the undisputed evidence before the Board in *Postal Service* plainly demonstrated that the airline pilots considered in that matter did not meet the Part 541 standard. The evidence before us in this case leads us to the same conclusion.

CONCLUSION

For the foregoing reasons, we **GRANT** the Administrator's petition for review. This matter is **REMANDED** to the Administrative Law Judge for further proceedings consistent with this decision.

SO ORDERED.

PAUL GREENBERG
Chair

E. COOPER BROWN
Member